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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers.	)	WC DOCKET NO. 03-251

INITIAL COMMENTS OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.

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TABLE OF CONTENTS

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	)	
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INITIAL COMMENTS OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.

Supra Telecommunications and Information Systems, Inc. ("Supra"), by its undersigned counsel, hereby files these Initial Comments, pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (the "FCC" or the "Commission") rules, to the Request for Declaratory Ruling (the "Request") filed by BellSouth Telecommunications, Inc. ("BellSouth") on December 9, 2003.

INTRODUCTION

The issues before the FCC are:

(1) Whether State utility commissions have authority to promote competition in the local voice market, and

(2) If so, whether this State authority is consistent with §251(d)(3) and other statutory provisions.

The answer to both of these questions is an unequivocal yes. Contrary to BellSouth's assertions, each of the state commission decisions cited by BellSouth are consistent with the

Triennial Review Order[1], 47 U.S.C § 251(d)(3), the Communications Act of 1934 ("1934 Act") as amended by the Telecommunications Act of 1996 ("1996 Act") (collectively referred to as the "Act").

Each of these state commission decisions is designed to accomplish two goals: (1) encourage the deployment of advanced services, and (2) promote competition in the local voice market. None of these decisions discourages BellSouth from investing in its broadband technology. Rather, these decisions **guarantee** BellSouth a full return on its investment in the broadband market, while simultaneously removing an alleged regulatory impediment (i.e. that BellSouth cannot provide DSL on a UNE loop because it does not have control of the loop), which BellSouth previously claimed was preventing it from selling its broadband products to **all** consumers with a wire-line phone. As a result of the various state commission decisions, BellSouth is free to aggressively compete with its cable and satellite broadband competitors.

BellSouth is currently sacrificing DSL revenues from customers that switch voice customers in an effort to achieve a long-term goal of diminishing and ultimately eliminating competition in the local voice market. This type of conduct has already been found to be illegal by the United States Supreme Court.[2]

A federal district court has already found that the Kentucky Public Service Commission ("KPSC") was not preempted (i.e. the KPSC was permitted to promote competition in the local voice

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1 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) "*Triennial Review Order*"), *petitions for mandamus and review pending,* United States Telecom Ass'n v. FCC, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

2 *See* Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585, 601, 610 (1985) ("the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.")

market) and that the State's decision was consistent with the Act.[3]

All of the state commission decisions dealt with the same question: whether BellSouth's practices were anti-competitive. BellSouth spends thirty-two (32) pages attempting to sidestep this question. Ignoring the obvious does not change the reality of BellSouth's anti-competitive actions. H.L. Mencken once said, "When you hear somebody say, 'This is not about money,' it's about money.'"[4] The same metaphoric principle applies here. When you hear BellSouth say, "This is not about anti-competitive acts,"[5] it's about anti-competitive acts.

BellSouth essentially makes three claims in its Request: (1) the various state commission decisions are preempted by §251(d)(3); (2) the state commissions are regulating broadband Internet access services; and (3) the state commissions are regulating interstate communications beyond their authority.

Contrary to BellSouth's claims, the various state commission decisions are not preempted. Moreover, the state commission decisions protect BellSouth's investment in DSL deployment and do

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3 *See* 12-29-03 Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, Frankfort, BellSouth Telecommunications, Inc. v. Cinergy Communications Company, et al , Civil Action No. 03-23-JMH (the "*District Court Order*") (A copy of which is attached hereto as **Exhibit A**.)

4 The Clinton Wars, Sidney Blumenthal, pg. 571. This memorable statement was made in 1999 by, the former Senior Senator from Arkansas, Dale Bumpers who stood on the Senate floor in defense of President William Jefferson Clinton. The full Senate had sat in stoic silence for several days - during the Trial to Remove the President - until Senator Bumpers took the floor and said the following: "H.L. Mencken, said on time, "When you hear somebody say, 'This is not about money, it's about money." Immediately, the full Senate broke out in laughter. Id. at 571. Senator Bumpers then added: "And when you hear somebody say, 'This is not about sex,' it's about sex." Id.

5 See pg. 9, 2nd ¶, BellSouth's Emergency Request For Declaratory Ruling: BellSouth acknowledges that the Georgia decision, like all the state commission decisions in its territory, was based upon an examination regarding whether BellSouth's practice of linking its xDSL service to its voice service was "anti-competitive." All the state commissions found that this practice was anti-competitive because the practice had the primary effect of reducing competition in the voice market – and that this practice is directly contrary to the explicit Congressional intent of the Federal Telecommunications Act of 1996.

not discourage competitors from investing in broadband facilities.

ANALYSIS

I. STATE COMMISSION DECISIONS PROMOTING COMPETITION ARE NOT PREMEPTED AND ARE CONSISTENT WITH THE DECISIONS OF THIS COMMISSION

A. A Federal District Court Found No Preemption

A federal district court in Kentucky has already ruled on the very issue BellSouth is attempting to bring before this Commission. In BellSouth Telecommunications, Inc. v. Cinergy Communications Company, et al, *Supra*, BellSouth sought review of the KPSC decision eliminating BellSouth's anti-competitive conduct by ordering that BellSouth may not refuse to provide DSL to a customer simply because that customer chooses to switch to a competing voice provider that utilizes UNE-L or UNE-P as a means to compete in the local exchange market.[6] In its appeal of the KPSC decision, BellSouth argued that the "[K]PSC's Order must fail because of federal preemption, stating that 'as a matter of federal law, the Federal Communications Commission – not state commissions – has exclusive jurisdiction over interstate communications.'"[7]

The Kentucky Court found to the contrary, stating:

> The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. Louisiana Pub. Serc. Com'n v. FCC, 47 U.S. 355, 360 (1986); *see also* Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas, 208 F. 3d 475, 480 (5th Cir. 2000). Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility" Id. **The FCC has also rejected the argument advanced by BellSouth, noting that "state commission authority over interconnection agreements pursuant to Section 252 extends to both interstate and intrastate matters.**" Reciprocal Compensation Ruling, ¶25, quoting Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report

6 *District Court Order* at p. 4.

7 *District Court Order* at p. 11.

and Order, 11 F.C.C.R. 15499, ¶84, 1996 WL 452885 (1996). (Emphasis added.)

District Court Order at p. 12 – 13.

The Kentucky Court went on to state:

> The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." Michigan Bell, 323 F.3d at 352. Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. **The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. § 251(d)(3)(c).** It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that **there is no federal preemption**. (Emphasis added.)

District Court Order at p. 15 – 16. A federal district court of the United States Government has determined that there is no federal preemption. BellSouth's only option for over turning the *District Court Order* is to appeal that decision to the applicable Circuit Court and subsequently to the United States Supreme Court, if necessary. *See* Alabama Power Co. v. FCC, 311 F.3d 1357 (C.A. 11 2002) *citing* Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir.1997) (where the Court writes: "The law . . . is 'emphatic" that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision.")[8] Despite the well-established "separation of power" principles, BellSouth is asking the FCC, an executive agency, to overrule a federal court's interpretation of federal law. The requested relief cannot be granted.

To support its request that the FCC act contrary to the Kentucky Court's decision, BellSouth

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8 Had BellSouth obtained a stay from each federal district court prior to any of them ruling, then it would have been appropriate for the FCC to interpret what Congress intended. While, the FCC does have the right to interpret federal law, that right is preempted once a federal district court or higher court enters and order interpreting a specific provision of federal law. At this point, given the Kentucky Court decision, the FCC is without constitutional authority to overrule that decision.

cites Vonage Holdings Corp. v. Minnesota Public Utilities Commission, 290 F.Supp.2d 993 (D. Minn. Oct. 16, 2003). In Vonage, the Minnesota Public Utilities Commission ("MPUC") found that a company providing voice service over the Internet ("VOIP") was required to register as a traditional local exchange company. The Minnesota federal district court found that Congress did not intend to regulate the Internet or information services such as VOIP. See Id., at 1003.

The Vonage case did not address the scope of §251(d)(3). More importantly, the MPUC's decision did not involve nor was it designed to protect an individual consumer's right to choose his or her local voice provider as guaranteed under the 1996 Act. All of the state commission decisions examined BellSouth's practice from the eyes of a single consumer with a wire-line telephone; and whether BellSouth can employ a practice that impedes upon, interferes with, or creates a disincentive to switching voice providers on that particular wire-line telephone. The VOIP service is not provided over the traditional wire-line telephone. Accordingly, the question regarding whether state commissions are authorized to protect an individual consumer's right to switch voice providers over his or her traditional wire-line telephone was never at issue in the Minnesota court case. As such, the Vonage opinion is neither controlling nor persuasive.

The threshold issue, BellSouth set out in its Request, is whether state commissions are preempted (and thus prohibited from promoting competition in the local voice market) under 47 U.S.C. §251(d)(3).[9] In order to provide the declaratory relief BellSouth requests, the Commission must find actual preemption under §251(d)(3). Again, a federal district court has already ruled on this issue and found "no" such preemption. Accordingly, BellSouth's Request must be denied on the grounds that the FCC cannot grant the relief requested.

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9 *See* Request at p. 4-5.

B. The Commission Invited Enforcement Action

Furthermore, in the FCC's *Line Sharing Reconsideration Order,*[10] this Commission expressly recognized that it did not preempt the question of whether BellSouth's practice is anti-competitive and therefore prohibited. While the Commission ruled that, at that time, it was not requiring ILECs to provide DSL service when they are no longer the voice provider, the Commission expressly concluded that it was not considering whether this situation is a violation of Section(s) 201 and/or 202(a) of the Act.

> [W]e deny AT&T's request for clarification that under the Line Sharing Order, incumbent LECs are not permitted to deny their xDSL services to customers who obtain voice service from a competing carrier where the competing carrier agrees to the use of its loop for that purpose. Although the Line Sharing Order obligates LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, it does not require that they provide xDSL service when they are not longer the voice provider. We do not, however, consider in this Order whether, as AT&T alleges, this situation is a violation of Sections 201 and/or 202 of the Act. To the extent AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action. (Emphasis added.)

Line Sharing Reconsideration Order, ¶26.

The question of whether BellSouth's practice of denying a competing carrier's voice customer DSL service is anti-competitive and therefore illegal was neither before, nor considered by, the Commission when it decided its *Line Sharing Reconsideration Order.*

Similarly, the Commission in the *Triennial Review Order* did not address this question, nor did the Commission revoke its prior invitation. The Commission's invitation to bring an action

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10 Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 16 F.C.C.R. 2101, (2001) ("*Line Sharing Reconsideration Order*").

against ILECs for employing anti-competitive practices is a clear indication of the Commission's intent that state enforcement action in accordance with state law would not be inconsistent or preempted by the Act or any prior FCC decision.

As stated by the Louisiana Public Service Commission ("LPSC"):

> BellSouth was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider. The FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider. However, **neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior** or illegally tying arrangements. (Emphasis added.)

LPSC Order R-26137 at p. 7.[11] "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[12] As noted by the federal court in Kentucky, no such preemption has occurred.

It is clear that the Act as well as Commission regulations implementing such contemplate that states will play a major role in implementing the Act's primary goal of promoting competition in the local voice market. The prevailing theme of the 1996 Act, as well as all of the Commission's Local Competition Regulations, is the Commission's goal that states will assist in promoting competition in the local voice market.[13] Any practice that has a detrimental effect on competition is therefore inconsistent with the express intent of the Act, Commission regulations and various state laws – and such practices must be eliminated.

Additionally, Section 261 of the Act provides:

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11 In re: BellSouth's provision of ADSL Service to end-users over CLEC loops, Docket No. R-26173 (January 24, 2003) ("*LPSC Order*"). Attached hereto as **Exhibit B**.

12 Louisiana Public Service Commission v. Federal Communications Commission, et al., 476 U.S. 355, 369 (1986) *citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218.

13 *See* MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc., 112 F.Supp.2d 1286, 1288 (N.D. Fla. 2000) ("The Act allows state commissions the option of taking

> (b) EXISTING STATE REGULATIONS.-- Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling requirements of this part, if such regulations are not inconsistent with the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS.-- Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further promote competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C. 261(b) – (c). This provision provides additional statutory authority demonstrating that the United States Congress intended states to act in promoting competition in the local voice market. . "Indeed, . . . fostering competition in the local telecommunications markets . . . is fundamental to the 1996 Act." *First Report and Order*[14]. There can be no question that the actions by the various state commissions to promote competition is fundamental to the implementation of the requirements of the Act and are consistent with FCC regulations. *First Report and Order*, ¶ 4. As demonstrated above, the decisions at issue were not, nor were intended to be, preempted.

C. Promoting Competition Is The Primary Purpose Of The 1996 Act

The cornerstone of the 1996 Act, and the Commission's *First Report and Order* was a provision for a three-pronged entry strategy by a competitor: (1) discounted resale of the ILEC's services, (2) combinations of UNEs to mimic existing services, and (3) collocation of competitor equipment in order to gain access to UNEs, whether combined or not. *First Report and Order*, ¶ 12. The Commission envisioned that a competitive carrier could likely use these three prongs, in sequence, as it entered a given market, grew its market share, and finally invested in permanent infrastructure. *Id.*

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a **major role in implementing** the Act's requirements.") (Emphasis added.)

14 In re Implementation of the Local Competition Provisions in the Telecommunications Act

The sequential entry strategy makes perfect sense. First, a CLEC would acquire customers in the discounted resale environment, using the ILECs existing facilities and replicating the services that the ILECs offer at a slightly lower price. Second, once the services were provisioned and the CLEC was billing the end users, the CLECs would convert the customer from the resale environment to the UNE environment. In the UNE environment the CLECs would be leasing the piece parts or the entire Platform from the ILEC at the ILEC's cost. Importantly, the CLECs could create their own, differentiated package of services using this method, and collect revenues from other carriers using the network elements to provide long distance or other services to the CLEC's local customers.

In the resale environment, these intercarrier revenues go directly to the ILECs and are not shared with the CLECs. The key to the UNE environment is that Congress ordered the ILECs to lease these individual network elements to CLECs at the ILECs' cost - thereby significantly decreasing the CLEC's cost of providing service when the CLECs are providing services via UNEs versus providing services via resale.

There is no physical difference to how the ILECs provide the wholesale services (whether via UNEs or resale). The only difference that the CLECs, and therefore the end-users, should experience is in the billing process. Most importantly, is that "access to UNEs may enable a CLEC to enter the market gradually, building a customer base up to the level where its own investment would be profitable."[15]

"UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application." *LPSC Order* at p. 13. "As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice

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of 1996, 11 FCC Rcd 15499, 15506, ¶ 4 (1996) ("*First Report and Order*").

15 United States Telecom Association v. Federal Communications Commission, 290 F.3d

being made by their competition." Id. CLECs should have the choice to determine how they choose to compete [i.e. Resale, UNE-P, and/or UNE-L], rather than the choice being made for them by the ILECs.

BellSouth has utilized and is utilizing its DSL product to impede competition in the local voice market, forcing all of its UNE-P competitors to maintain customers on Resale if the CLEC wants to service customers who wish to retain or obtain BellSouth's DSL product.

The various state commission decisions promoting competition are meaningful and of great significance to the industry and to the long term goals of competition as envisioned by the Act. Without these decisions, BellSouth can and will continue to interfere with CLECs' three-pronged entry strategy by forcing the CLECs into the Resale environment. Moreover, as BellSouth's DSL customer base increases, more and more CLECs will be limited to utilizing Resale as its sole option. As BellSouth's DSL market grows, the voice market open to competition correspondingly diminishes.

At year-end 2002, BellSouth increased its DSL customer base to 1,021,000 (at a growth rate of 64 %).[16] BellSouth's DSL customer base has increased substantially for the year ending 2003. Under BellSouth's business practices, each and every one of these customers that chooses to purchase DSL from BellSouth, or one of its wholesalers, is denied the right to freely exercise his or her rights to switch voice providers as expressly contemplated under the 1996 Act.

D. Obligating ILECs To Provide DSL To CLEC Voice Customers Is Consistent With The Purposes Of The Act.

In ruling on BellSouth's Request, it is important to keep in mind Congress' intent in passing

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415, 424 (D.C. Cir. 2002).

16 See January 24, 2003 BellSouth Press Release "BellSouth Achieves DSL Subscriber Target For 2002, Completes Year With More Than 1,000,000 DSL Customers", attached hereto

the 1996 Act. The Preamble calls it "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[17] The Commission confirmed its belief that "this language gives the best snapshot of Congress' overall intent in enacting the 1996 Act."[18]

By prohibiting BellSouth from refusing to provide DSL to CLEC voice customers, the purposes of the Act are furthered in that (1) competition is promoted in the local voice market; and (2) rapid deployment of new technologies is encouraged and protected.

1.) Promotion Of Competition In The Local Voice Market

ILECs are prohibited from interfering with a consumer's right to obtain a voice provider of his or her choosing or a CLEC's right to access to those customers. BellSouth cannot engage in a practice that has the primary consequence of thwarting competition in the local voice market, and then claim an immunity or shield against state commissions' jurisdiction to prevent such practices. Section 202(a) of the Act provides in pertinent part as follows:

> It shall be **unlawful for any common carrier** to make any unjust or unreasonable discrimination in charges, **practices**, classifications, regulations, facilities, or services for **or in connection with** like communication service, **directly or indirectly, by any means or device**, or to make **or give any undue or unreasonable preference or advantage to any particular** person, **class of persons**, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. (Emphasis added.)

This "anti-discrimination" provision, under which this Commission invited enforcement action, prohibits BellSouth from giving any undue preference or advantage to any person or class of persons

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as **Exhibit C**.

17 *See* Preamble to the 1996 Act.

18 *Triennial Review Order*, ¶ 70.

(e.g. BellSouth voice customers) or subject any person or class of persons (e.g. CLEC voice customers) to any undue prejudice or disadvantages "directly or indirectly" or "by any means or device." BellSouth is accomplishing just that by utilizing its DSL service to impede competition in the local voice market.

Once a customer has experienced DSL, dial-up Internet is simply not an option. A customer that has already gone through all the hoops to have DSL installed and obtained an e-mail address will be unlikely to switch their local service provider if they have to go through all the hoops again, obtain a new e-mail address to disseminate to friends and family, and re-learn a new internet product. Denying a CLEC voice customer DSL simply because the customer seeks to exercise his or her rights under the 1996 Act creates a disincentive to switching and impedes competition. Allowing BellSouth to disconnect its DSL product when a customer is converted to a competitor via UNE-P does just that. Conversely, as recognized by various state commissions, obligating BellSouth to provide DSL to a customer who seeks to have voice service from the carrier of his or her choice promotes competition.

2.) Encourages Deployment Of Advanced Technologies

The BellSouth cited state commission decisions are wholly consistent with Section 706(a) of the 1996 Act, which provides in pertinent part as follows:

> The Commission and each **State commission** with regulatory jurisdiction over telecommunications services **shall encourage the deployment** . . . of **advanced telecommunications capability** to all Americans . . . **by utilizing**, . . . **measures that promote competition in the local telecommunications market**, or other regulating methods **that remove barriers** to infrastructure investment. (Emphasis added).

The above bolded language in Section 706 is an explicit expression of Congressional intent that the deployment of advanced services is wholly consistent with the promotion of competition in

the local voice market. This point cannot be stressed enough. The above referenced provision contemplates that State commissions shall employ "measures that promote competition in the local telecommunications market" as a means to encourage the deployment of advanced services.

Despite the obvious express Congressional intent in Section 706(a), BellSouth argues the opposite - that the promotion of local voice competition is detrimental to the deployment of advanced services. BellSouth alleges that the various state commission decisions are "forcing BellSouth to provide service in a manner that ... discourages competitors from investing in broadband facilities."[19] BellSouth argues, without support:

> If CLECs can force an ILEC to continue offering broadband services to the CLECs' voice customers, their incentive to develop independent broadband capabilities and to invest in new and innovative broadband facilities is decreased.

Request at p. 2 -3.

The facts are to the contrary. Each state commission decision, in BellSouth's territory, guarantees BellSouth a full return on its broadband investment. By not separately unbundling either the high frequency or low frequency portion of the loop, a CLEC is forced to obtain and pay for both portions. The CLEC then allows BellSouth, at no cost, use of the high frequency portion of the loop. BellSouth then can provide its DSL product to the CLEC's voice customer with no impediments. This is directly contrary to BellSouth's assertion that "forced sharing deprives ILECs of the benefit of their investment in DSL."[20] BellSouth's investment is fully protected and further deployment of broadband technologies is encouraged. In this scenario, BellSouth will attain more money from its investment in DSL by servicing 100% of all customers with a wire-line telephone. Rather than securing the additional profits from its investment, BellSouth chooses to deny itself these immediate

19 Request at p. 1.
20 Request at p. 3.

short-term benefits in an effort to achieve a long-term goal of diminishing competition in the local voice market.

II. THE FLORIDA DECISION, LIKE THE OTHER STATE COMMISSION DECISIONS, PROMOTES COMPETITION AND GUARANTEES BELLSOUTH A FULL RETURN ON ITS INVESTMENT

A. Florida Decision Guarantees BellSouth A Return On Its Investment

BellSouth discusses the *FDN Order*[21] issued by the Florida Public Service Commission ("FPSC") at pages 6-8 of its Request. In this arbitration, Florida Digital Network ("FDN"), a Florida-based CLEC, requested that the FPSC: (1) prohibit BellSouth's practice of disconnecting DSL when a BellSouth voice customer chooses to switch to a UNE voice providers, (2) unbundle the packet switching functionality of the Digital Subscriber Line Access Multiplexers ("DSLAMs") and offer a broadband UNE consisting of the entire transmission facility from the customer's premises to the central office, and (3) permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail.

The FPSC granted the first request based upon on an anti-competitive standard consistent with state and federal law. See *FDN Order* at pg. 11.

The second request was denied based on the "necessary and impair" standard. See *FDN Order* at pg. 17 (finding that the impact on the ILEC's incentive to invest in technology developments to be most compelling). The FPSC refused to make BellSouth's xDSL service into a UNE To do so, would have created a disincentive to future investment and further deployment of this technology. Rather, by refusing to create a new UNE, the FPSC guaranteed BellSouth a full return on its investment by allowing it to sell its product to more customers and retain all associated

21 Petition by Florida Digital Network, Inc. for Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (June 5, 2002) ("*FDN Order*") (Attached hereto as **Exhibit D**).

revenues derived there from. In fact, none of the other state commission decisions in BellSouth's territory requires BellSouth to unbundle its xDSL product. Throughout its entire region, BellSouth is guaranteed a full return on its investment. It is simply disingenuous for BellSouth to suggest that the Florida decision will discourage investment.

The third request[22] was denied because the request was outside the scope of §251(c)(4)(A). *See FDN Order* at pg. 24. With respect to FDN's first request, the FPSC expressly concluded:

> [I]n the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess [BellSouth's DSL service] even when BellSouth is no longer the voice provider **because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market**, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes. (Emphasis added.)

Id at 10. The FPSC made the following findings of fact:

> - BellSouth Witness Ruscilli confirms that BellSouth will not offer its FastAccess Internet Service to a voice customer of another carrier. *Id.* at pg. 4.
>
> - The evidence indicates that BellSouth routinely disconnects its FastAccess service when a customer changes its voice provider to FDN, which reduces customer's options for local telecommunications service. *Id* at pg. 10.
>
> -The evidence also indicates that this practice is the result of a business decision made by BellSouth. *Id.*
>
> -The record does not, however, reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be unduly burdensome. *Id.*
>
> -We find that this practice unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. *Id.* at pg. 11.
>
> -This practice is in contravention of Section 364.10, Florida Statutes, and Section 292 of the Act. *Id.*
>
> -We find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider, this practice is also in violation of Section 364.01(4),

22 A request to permit CLECs to resell the xDSL product under resale rules.

Florida Statutes. *Id.*

On July 1, 2002, shortly after the *FDN Order*, the FPSC issued Order No. PSC-02-0878-FOF-TP ("*Supra Order*").[23] The *Supra Order* again found that BellSouth's practice of disconnecting its DSL service from a customer migrating over UNE-P is anti-competitive. The FPSC incorporated the *FDN Order* into the *Supra Order* finding that:

> "the decision regarding BellSouth's policy on FastAccess went to the legality of that [BellSouth] policy under Florida law and our [State Commission] jurisdiction to address it." (Emphasis added.)

Supra Order at pg. 50.

B. Florida Decision Removes Alleged Regulatory Impediment

The FPSC also removed any "alleged" regulatory impediment to the further deployment of advanced services. Though not contained in its Request, BellSouth has previously argued that once a customer migrates over UNE, BellSouth is prohibited from selling its xDSL products to that customer because that line is now "owned" by the CLEC. The *FDN Order*, as well as all the other state commission decisions in BellSouth's territory, removes this alleged barrier by allowing BellSouth to provide its product over the CLEC-owned line. Through these decisions, no CLEC is permitted to interfere with BellSouth's right to continue to use the high frequency portion of that loop to provide its DSL service after the migration over UNE-L or UNE-P. Consequently, each of these state commission decisions guarantee BellSouth the right to aggressively and effectively compete with its cable and satellite DSL competitors for 100% of all customers with a wire-line telephone.

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23 See In re: Arbitration between Supra Telecom and BellSouth, Docket No. 001305-TP, July 1, 2002 (relevant pages attached hereto as **Exhibit E**).

C. Florida Decision Does Not Dictate Terms And Conditions

BellSouth's only goal is to stifle competition in the local voice market. BellSouth complains that the FPSC "detailed multiple terms and conditions" on how BellSouth should provision its retail DSL service.[24] BellSouth goes as far as to state that the "Florida commission imposed" these conditions upon it.[25] Such claims are misleading.

The alleged terms and conditions detailed by BellSouth in its Request came about as a result of a **voluntarily** negotiated agreement between BellSouth and FDN. The initial FPSC decisions – involving Supra and FDN - simply expected BellSouth to allow the "same" seamless migration that presently takes place over Resale to occur over UNE. This point cannot be stressed enough. BellSouth freely admits in its Request (pg. 14 fn 16) that it does not object to continuing to provide its retail DSL service over the same line – so long as the customer migrates over Resale.

To avoid having to provide the same seamless migration over UNE, which BellSouth presently allows over Resale, BellSouth filed a Motion for Reconsideration or Clarification ("*Recon Motion*") of the *FDN Order*. See *Recon Motion* attached hereto as **Exhibit F.** In this Recon Motion, BellSouth writes: "BellSouth respectfully requests that the Commission clarify that BellSouth is not required to provide its FastAccess service over a UNE loop, **but that instead**, BellSouth **may provide that service over a new loop** that it [BellSouth] installs to serve the end user's premises as set forth below." Pg. 13-14 *Recon Motion*. Here, BellSouth explicitly asked the FPSC to allow it to "require" the customer to obtain a second loop, if the customer migrates its voice service to a CLEC over a UNE line.

BellSouth continued: "BellSouth will install a new loop facility to serve the end user's

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24 *See* Request at p. 7.
25 *Id.*

location. Once that new facility is in place, BellSouth's FastAccess service will be moved from the loop that it currently is on to the **new loop**." [26] "Once the **new loop** facility is in place and Fast Access is being provided over that **new facility**, BellSouth will charge the end user the standard rates for Fast Access **plus an additional charge**, not unlike the additional charge cable modem providers might charge customers who do not also purchase basic cable service from the cable company."[27]

Here, BellSouth is describing the "additional charge" it intends to impose on customers as a penalty for switching voice providers. The *FDN Order* allows BellSouth to price its DSL at whatever price it so chooses. This decision does not interfere with BellSouth if they wish to charge a lower price for its DSL in South Florida versus North Florida.

BellSouth is also free to charge a different price to a customer who does not subscribe to a qualifying package such as BellSouth's Complete Choice. For example, at present, a BellSouth voice customer with Plain Old Telephone Service ("POTS") pays a higher price for BellSouth's FastAccess DSL product. If that same customer subscribes to one of BellSouth's qualifying packages[28] (e.g. Complete Choice), then the price of FastAccess is discounted. The FPSC simply prevents BellSouth from applying a monetary penalty targeted only at customers seeking to switch voice providers. In other words, a customer who switches to a CLEC would pay an even higher price than a BellSouth voice customer with a POTS line. The *FDN Order* simply prevents BellSouth from employing this means to penalize customers who seek to exercise their right to choice under the Act. Simply put, the price BellSouth sets for customers who do not also purchase a qualifying package should also apply to a BellSouth DSL customer that purchases his or her voice service from a

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26 *Recon Motion* at p. 19.

27 *Id.* at p. 20.

28 A qualifying package is a package of voice services which if purchased qualifies the customer to receive a discount on BellSouth's DSL product.

competitor.

The difference between ILECs and cable or satellite providers is that incumbent telecommunications carriers have specific legal obligations under the Act. "[T]he Act imposes on local carriers, as a matter of federal law, various duties designed to foster competition." [29] The first and foremost duty on BellSouth is not to engage in anti-competitive practices that impede competition in the local voice market.[30]

In response to BellSouth's Motion for Reconsideration, the FPSC expressly stated:

> Although the issue of **how** FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's [initial FDN] Order, **we believe that FDN's position is in line with the tenor of our decision**.

See FPSC Order No. PSC-02-1453-FOF-TP issued October 21, 2002 ("*FDN Recon Order*".)[31]

The FDN position found to be "consistent" with the Commission's initial decision was (1) "BellSouth's provisioning proposal [of requiring a second loop] would be harmful and undermine the Commissions intent,[32] and (2) "that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant."[33]

While the FPSC acknowledged that its initial decision was silent on "how" the provisioning would be implemented, the FPSC was clear that such provisioning would not include the requirement that a consumer obtain a second line as a condition to switching voice providers. The FPSC stated:

> [W]e believe that FDN's position (i.e. No 2nd loop) is in line with the tenor of our

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29 MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc., 112 F.Supp.2d 1286, 1288 (N.D. Fla. 2000).

30 *See* § 202 and § 261(c) of the Act.

31 *FDN Recon* Order, **Exhibit G.**

32 *Id.* at pg. 5

33 *Id.*

> decision While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered (i.e. No 2nd loop) when the customer switched voice providers.

FDN Recon Order at p. 5.

The use of the phrase shall "not be altered" indicates that no second loop shall be required as a condition to switching voice providers. If this were not the intent of the FPSC, then BellSouth's *Recon Motion* would have been granted in some form; however, the *Recon Motion* was denied in its entirety.

Having lost on its *Recon Motion*, BellSouth approached FDN and offered to renegotiate the parties' Florida interconnection agreement as an inducement for FDN to accept BellSouth's second loop proposal; thereby circumventing and ignoring the FPSC's orders. FDN accepted and stated: "At BellSouth's request, FDN also consented to renegotiate considerable portions of the agreement filed with the arbitration petition."[34]

FDN goes on to explain, in its Motion To Approve, that the FPSC rejected BellSouth's interpretation that BellSouth should be permitted to demand that a customer obtain a second line prior to switching.[35] Despite this explicit rejection, FDN **voluntarily** accepted the "two loop" approach in order to obtain other favorable concessions from BellSouth in other parts of the interconnection agreement. FDN and BellSouth subsequently filed an agreement regarding numerous terms and conditions which would have to be implemented in order for the "two loop" provisioning to function.

Thus, it was at BellSouth's insistence that the FPSC would ultimately detail these "varying terms and conditions." The intent of the FPSC decisions was simply that BellSouth allow the same

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34 *See* FDN Motion To Approve Interconnection Agreement ("*Motion To Approve*") filed with the Florida Commission on November 19, 2002, attached hereto as **Exhibit H**.

seamless migration that presently takes place over Resale to occur over UNE. BellSouth voluntarily negotiated with FDN to obtain many varying terms and conditions that the FPSC never intended nor contemplated. To now assert that the FPSC imposed on BellSouth the very terms and conditions that BellSouth voluntarily negotiated is disingenuous.

III. SHOULD THE COMMISSION FIND PREEMPTION, THE COMMISSION WILL BE INVITING A SUBSEQUENT COMPLAINT

An FCC finding that state commissions are preempted from promoting competition in the local voice market will necessarily result in an appeal of that decision as well as additional complaints being filed at the FCC. The CLEC community would then ask this Commission to order BellSouth to cease its anti-competitive practice for the same reasons outlined by the various state commissions and the Kentucky federal district court, as well as the following additional reasons.

A. No Business Justification To Deny DSL To Customers Serviced Via UNEs

Under the current rules, a CLEC opting to use UNE-P purchases both the high frequency and low frequency portions of the loop. The CLEC then provides voice service to the customer utilizing the low frequency portion. At no cost, the CLEC allows BellSouth access to the high frequency allowing: (1) the customer to receive BellSouth's DSL; and (2) BellSouth to obtain additional profits from the additional DSL customers. However, rather than allowing the customer to receive DSL, BellSouth chooses to forego these additional revenues.

BellSouth may argue that it has a right to provide its DSL product to whomever it chooses. However, as noted by the Supreme Court, the "high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585, 601 (1985). In fact, the Supreme Court

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35 *See* FDN *Motion To Approve* pg. 3, 2nd ¶.

"squarely held that this right was not unqualified." Id. *citing* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

The Supreme Court has held that if a firm has been attempting to exclude rivals on some basis other than efficiency it is fair to characterize its behavior as predatory. Accordingly, the Court found it appropriate to examine the effect of the challenged pattern of conduct on consumers, smaller competitors, and the firm itself. Aspen Skiing Company, 472 U.S. at 605.

In Aspen Skiing Company, "what the defendant refused to provide to its competitor was a product that it already sold at retail". Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. ____ (2004). One ski company "was apparently willing to forgo daily ticket sales". Id. at 608. "The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." Id. The Supreme Court went on to find "the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610.

Similar to Aspen Skiing Company, the Commission should find that BellSouth's refusal to provide its DSL product to customers receiving voice service via UNE-P from a competitor is not motivated by efficiency concerns. As in Aspen Skiing Company, BellSouth is willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rivals BellSouth admits that it will provide its DSL service to customer serviced via resale. As previously described, the difference between resale and UNE is a mere billing change. As such, BellSouth cannot now claim efficiency as a justification for its refusal. BellSouth's sole motivation in denying its DSL to UNE-P customers is to diminish its competitors' profits. By forcing

competitors to use resale as opposed to UNE-P, the CLECs costs to provide service increases while its intercarrier revenues decrease. Ultimately, the CLEC will not be able to survive in such an environment, as BellSouth is well aware.

B. The Same Rational For Requiring Local Number Portability Applies

The Commission released the Local Number Portability ("LNP") *First Report and Order*[36] in 1996, which promulgated rules and deployment schedules for the implementation of number portability. The Commission highlighted the critical policy goals and rationale underlying the LNP requirement, stating:

1.) Number portability is essential to meaningful competition in the provision of local exchange services.
2.) Several state commissions have also recognized the significant role that number portability will play in the development of local exchange competition.
3.) We therefore, affirm our tentative conclusion that number portability provides consumers flexibility in the way they use their telecommunications services and promotes the development of competition among alternative providers of telephone and other telecommunications services.
4.) We note that several studies described in the record demonstrate the reluctance of both business and residential customers to switch carriers if they must change numbers.
5.) The ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase.
6.) Number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers.
7.) The resulting competition will benefit all users of telecommunications services.
8.) Indeed, competition should foster lower local telephone prices and, consequently, stimulate demand for telecommunications services and increase economic growth.
9.) To the extent that customers are reluctant to change service providers due to absence of number portability, demand for services provided by new entrants will be depressed. This could well discourage entry by new service providers and thereby frustrate the pro-competitive goal of the 1996 Act.

LNP First Report and Order at 8367, ¶¶ 28-31.

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36 Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (the "*LNP First Report and Order*")

For the exact same reasons this Commission required LNP, the Commission should require that ILECs do not disconnect their high-speed services for Internet access when a customer opts to change voice carriers. As was the case in LNP, several state commissions have found that placing such an obligation on BellSouth will foster competition in the local exchange market. Conversely, these same state commissions have found that allowing BellSouth's conduct will frustrate the pro-competitive goal of the 1996 Act. High-speed Internet access is becoming more and more prevalent. As of June 30, 2003, 23.5 million high-speed lines connected homes and business to the Internet. See FCC Release dated 12-22-03. Customers are relying on and becoming increasingly more dependent upon their high-speed Internet access (including, but not limited to, their e-mail accounts) for both business and personal needs. Much like the situation with telephone numbers, customers are reluctant to switch carriers if they must change their Internet service.

CONCLUSION

For all of the reasons discussed herein, Supra requests that the Commission issue a declaratory ruling that state commission decisions promoting competition in the local voice market are not preempted.

Respectfully submitted this 30th day of January 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Comments was sent this 29th day of January 2004 to the following individuals at the following addresses:

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